No. 98-1747

In the Supreme Court of the United States

ROSALINDA L. PEREZ, ET AL., PETITIONERS

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a racial or language minority plaintiff challenging an at-large voting system under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may not make out a claim of vote dilution unless the plaintiff can show that the minority could constitute a majority in a single-member district.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. This case is a challenge under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to the system used to elect the Board of Trustees of the Pasadena (Texas) Independent School District (PISD). PISD is located in Harris County, and includes all of the cities of South Houston and Pasadena as well as parts of the City of Houston. Pet. App. 24a. The seven members of the Board of Trustees of PISD are all elected from the entire school district at-large, for staggered terms.

Each trustee is elected for a specific place on the Board and gains election by a plurality of votes for that position. Single-shot voting is not permitted. *Id.* at 3a.

Petitioners, Hispanic residents and citizens eligible to vote in elections for PISD, brought suit alleging that PISD's election system dilutes Hispanic voting strength in violation of Section 2. According to the 1990 census, almost 190,000 people live in PISD; Hispanics comprise approximately 30% of the total population and 26% of the voting age population (VAP) of PISD. Pet. App. 29a. Only one Hispanic has been elected to the PISD Board of Trustees. *Id.* at 3a.

At trial, petitioners presented a districting plan, based on data drawn from the 1990 census, designed to show that two single-member districts could be drawn with a majority Hispanic population and a majority Hispanic VAP. Pet. App. 30a. Respondents, however, maintained that, to state a claim under Section 2, petitioners were required to show that it was possible to draw a single-member district with a Hispanic majority of the *citizen* voting age population (CVAP). Further, according to a regression analysis performed by respondents' expert demographer, approximately 60% of voting age Hispanics in PISD are citizens. *Id.* at 35a-36a. Thus, respondents maintained (and the district court agreed) that a single-member district in PISD must have 62.5% Hispanic VAP to ensure a 50% Hispanic CVAP in that district. *Id.* at 36a-37a. The highest Hispanic VAP percentage for any of petitioners' proposed districts, however, was only 55.07%. *Id.* at 37a.

Petitioners also introduced evidence at trial showing that one potential single-member Hispanic-majority district for PISD, District 1 of the Korbel Plan, which had a 55.07% Hispanic VAP, substantially overlapped

geographically with City Council District C in the City of Pasadena. See 5/31/95 Tr. 18; 6/1/95 Tr. 99; 6/8/95 Tr. 94. Pasadena District C has a 55.4% Hispanic VAP. 5/3/95 Tr. 18; 6/2/95 Tr. 23. But even though only 60% of voting-age Hispanics in the area are citizens, voters in Pasadena District C have elected Hispanic representatives to the city council. 5/31/95 Tr. 18, 24-25; 6/1/95 Tr. 99; 6/2/95 Tr. 24. Hispanics actually made up the majority of persons turning out to vote in Pasadena District C in the 1995 election. 6/8/95 Tr. 94.

In addition, District 6 of the Korbel Plan, which had a Hispanic VAP of 50.04%, incorporated a substantial portion of the City of South Houston. 6/1/95 Tr. 101. Currently, the VAP of South Houston is about 55% Hispanic. *Id.* at 106. Evidence introduced at trial indicated that Hispanics have been elected at-large to the City Council of South Houston (including in 1981, when Hispanics constituted approximately 45% of the VAP of South Houston) and continue to have a high potential of being elected there. 5/3/195 Tr. 25-26.

Petitioners also introduced evidence showing that Hispanics had been elected in other districts in the area with a Hispanic VAP under 62.5%, including Texas House of Representatives District 143 (52% Hispanic VAP), Texas Senate District 6 (56% Hispanic VAP), and two Houston City Council Districts (53% and 55% Hispanic VAP). 5/31/95 Tr. 17-18, 24-25, 71-72; 6/2/95 Tr. 17.

2. The district court held that the existing election system in PISD does not violate Section 2. Pet. App. 16a-93a. The court observed that, under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), three preconditions to establishing a vote dilution claim under Section 2 are that a minority plaintiff show "*[f]irst* that the [minority] group is sufficiently large and geographically compact

to constitute a majority in a single member district; *second*, [that] it is politically cohesive and *third*, that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." Pet. App. 19a.

Thus, the court stated, "[t]he threshold question is whether it is possible to draw one or more majority-minority districts in the PISD," and that "[d]rawing majority-minority districts requires a minority population that is of sufficient size and compactness to allow the construction of a compact and contiguous district in which the minority group can form an effective voting majority." Pet. App. 28a-29a (footnote omitted). The court then ruled that, to satisfy that threshold requirement under *Gingles*, "a plaintiff must establish that it is possible to create a district with a majority of minority voting-age *citizens*." *Id.* at 33a. Because petitioners had "fail[ed] to prove that it is feasible to create one or more districts in which a majority of voting-age citizens are Hispanic," *id.* at 38a, the court ruled that petitioners could not establish a violation of Section 2, see *id.* at 47a, 82a-83a.[1] The district court did

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[1] The district court's opinion also stated that the Korbel Plan's proposed Hispanic districts "are irregularly shaped, evidencing a lack of geographic compactness," Pet. App. 37a, and that the population of those districts deviated from the ideal district population in PISD by about 32%, *id.* at 38a. It is not clear, however, whether the district court ruled in the alternative that for those reasons petitioners had failed to establish that it was possible to draw an appropriate single-member district as a remedy for a Section 2 violation. The district court's conclusions of law reiterated that "[d]rawing majority-minority districts requires a minority population that is of sufficient size and compactness to allow for the construction of a compact and contiguous district in which the minority group can form an effective voting majority," *id.* at 82a, but it did not explicitly hold that petitioners had failed to establish

not discuss petitioners' evidence that Hispanic voters in existing comparable districts with less than a majority Hispanic CVAP had succeeded in electing representatives of their choice.[2]

Even though the district court ruled that petitioners failed to satisfy the threshold requirement under *Gingles* for establishing a Section 2 violation, the court also undertook an extensive analysis of the other *Gingles* factors (Pet. App. 47a-69a) as well as the totality of the circumstances surrounding the PISD

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a Section 2 violation because the districts in the Korbel plan were underpopulated or irregular in shape. The district court's ultimate conclusion was that petitioners "have not proven that it is possible to create a single-member district in which the majority of voting-age citizens is Hispanic," *id.* at 87a, suggesting that its principal concern was that petitioners had not drawn a district with a Hispanic majority CVAP. Further, the court of appeals did not address either the issue of compactness or that of excessive deviation from the ideal population, but ruled solely on the ground that the districts in the Korbel plan did not have a majority Hispanic CVAP. *Id.* at 11a. If this Court were to reverse that conclusion and remand for further proceedings, it would presumably be open to the parties on remand to address whether the demonstration districts in the Korbel plan were insufficient for other reasons, and whether those insufficiencies, if shown, would prevent the establishment of a Section 2 claim.

[2] Petitioners urged the district court to consider evidence of population trends since the 1990 census, which showed that the Hispanic percentage of the VAP and CVAP in PISD had increased. Pet. App. 38a-39a. The district court observed that, because of the passage of several years and substantial population shifts, the 1990 census data probably did not accurately reflect the demographics of the current population of PISD. *Id.* at 41a, 44a. The court nonetheless found that the 1990 census data provided "the most reliable estimate" of population information available, *id.* at 47a, and it therefore declined to rely on petitioners' proffered evidence of projected population trends in PISD instead of the census data, *ibid.*

election system (*id.* at 69a-82a). Based on that analysis, the court ruled that the Hispanic minority in PISD was politically cohesive (*id.* at 84a). The court did not reach a definitive conclusion whether the Anglo majority voted as a bloc to defeat the candidates preferred by Hispanics (*id.* at 85a), although it did find that "Anglo voters generally have not voted for Hispanic candidates in the PISD elections" (*id.* at 69a). The court further concluded that Hispanics have been consistently underrepresented on the PISD board (*ibid.*). Finally, the court stated that petitioners had raised "serious and valid concerns that hindrances to equal opportunity to participate in the political process [in PISD] are present" (*id.* at 87a), including "[t]he small number and inconvenient location of polling places, the short polling hours, the absence of minority election officials, and the incumbents' campaign-fund pooling system" (*ibid.*). Despite those observations, the district court ultimately found no Section 2 violation, because petitioners had failed to identify a single-member district that could be drawn with a majority Hispanic CVAP (*ibid.*).

3. The court of appeals affirmed. Pet. App. 1a-15a. The court stated that "[a]s a matter of law, the use of at-large voting can impede the ability of minority voters to elect representatives of their choice only if the plaintiffs demonstrate that the group meets the three *Gingles* requirements." *Id.* at 9a. With respect to the first *Gingles* requirement that it be possible to draw a single-member district with a majority of the minority group, the court ruled that courts considering a vote dilution claim "must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority." *Id.* at 10a. That rule, the court

stated, is compelled by the plain language of Section 2. *Ibid.*

The court also rejected as irrelevant petitioners' evidence of election results in similar districts in which Hispanics, although less than a majority of the CVAP, had succeeded in electing representatives of their choice. Pet. App. 10a-11a. The court stated that evidence of populations and elections from other jurisdictions might be relevant to determine whether Hispanics reached the threshold of a majority of the CVAP in a proposed single-member district, if no more direct evidence on that point were available, but "evidence that the group may succeed in electing preferred candidates cannot remedy its failure to meet the [first] *Gingles* threshold." *Id.* at 11a. The court therefore affirmed the district court's judgment in favor of respondents. *Ibid.*

DISCUSSION

This case presents the same issues as those presented in *Valdespino* v. *Alamo Heights Independent School District*, No. 98-1987. As we explain in our brief in response to the Court's invitation in *Valdespino* (at 5-18), those issues warrant this Court's review. The court of appeals panel in this case, like the panel in *Valdespino*, held that petitioners could not establish a Section 2 vote dilution claim solely because they could not show that Hispanics would constitute a majority in a single-member district, and ruled irrelevant evidence put forward by petitioners that Hispanic voters in a similar single-member election district, although not constituting the majority in that district, had been able to elect representatives of their choice. Pet. App. 11a. The court of appeals reached that conclusion in this case, moreover, even though the district court had

found considerable cause for concern that the totality of circumstances surrounding the election system in PISD prevented Hispanics from participating equally in the political processes. *Id.* at 87a. We also explain in our brief in *Valdespino* (at 10-14) that the absolute 50% rule applied by the court of appeals in this case and in *Valdespino* is erroneous. Accordingly, the Court should grant certiorari to decide whether a minority plaintiff is barred from establishing a Section 2 vote dilution claim without proof that the minority would constitute the majority of a single-member district, or whether such a plaintiff can pass the first threshold requirement of *Gingles* by pointing to evidence that the minority has been able to elect representatives of its choice in a district with similar demographics, even though it does not constitute the majority in that comparison district.

It may also be necessary for the Court to decide in this case, as it may be in *Valdespino*, whether a court hearing a Section 2 vote dilution claim must look to the single-member district's CVAP to determine whether plaintiffs have satisfied that first threshold requirement of *Gingles*. As in *Valdespino*, if this Court were to agree with the court of appeals that a vote dilution plaintiff must show that the minority could constitute an absolute numerical majority of a single-member district, then the question would necessarily arise as to how the plaintiff may show that the minority could constitute the "majority"—*i.e.*, whether the minority must make up the majority of the total population, VAP, or CVAP of such a district. See U.S. Br. at 14-16, *Valdespino*.[3]

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[3] As in *Valdespino*, that question is less likely to be significant in this case if this Court holds that a Section 2 vote dilution claim

As we explain in our brief in *Valdespino* (at 16-17), although it is clearly the right of citizens to vote that is pertinent to the concept of vote dilution under Section 2, there are some significant practical difficulties with a rule that would require courts in all circumstances to rely on CVAP data from the census to determine whether a minority group could elect a representative of its choice from a single-member district. Moreover, this case may present a circumstance in which the CVAP data relied on by the district court did not give the court a fully accurate understanding of whether it is possible to draw a single-member district in which a minority could elect a representative of its choice. The district court relied on a regression analysis prepared by respondents' expert to conclude that approximately 60% of the Hispanic VAP in petitioners' demonstration district are citizens. See Pet. App. 35a-37a. The regression analysis used by the district court, however, yielded a citizenship rate for Hispanics in the entire PISD, which is a much larger area than the two

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does not require the minority to be an absolute numerical majority in a single-member district. Petitioners have shown that Hispanics would be very close to a majority of the CVAP of their demonstration district, and have also submitted evidence to show that Hispanics in a comparison district with a similar Hispanic percentage of CVAP have elected a representative of their choice. Even if the Court agrees with us that the court of appeals' 50% rule is unwarranted, however, the question whether a court hearing a Section 2 vote dilution claim should look to CVAP or VAP may nonetheless have significance in some cases. To establish a vote dilution claim, the plaintiff must show that the minority would be "sufficiently large" in a single-member district. *Gingles*, 478 U.S. at 50. At some point the minority population may simply be too small in any single-member district to elect its representative of choice, and the question whether a court should look to CVAP or VAP to make that determination may be important in some cases.

demonstration single-member districts proffered by petitioners. See *ibid.* The district court does not appear to have considered any evidence directly establishing the citizenship rates for Hispanics specifically in the demonstration districts. The regression analysis used by the district court may have masked the possibility that citizenship rates for Hispanics are higher among the population located in those two demonstration districts than elsewhere in the PISD, and that Hispanics in those districts would have had the potential to elect a representative of their choice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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